IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 210 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SURESH NARBHESHANKAR JOSHI - Appellant(s)

Versus

THE STATE OF GUJARAT & 2 - Defendant(s)

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Appearance :

MR KIRTIDEV R DAVE for Appellant(s) : 1,
None for Defendant(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 13/12/2005

ORAL JUDGMENT

The appellant herein was the plaintiff in Regular Civil Suit No.587 of 1988, which came to be dismissed by the judgment and decree passed by the 2nd Joint Civil Judge, (S.D.) on 29th January, 1994. Aggrieved therewith the appellant preferred Regular Civil Appeal before the District Court, Kutch at Bhuj bearing No. 15 of 1994,

which came to be dismissed on 26th October, 2004 and hence this Second Appeal.

2. The appellant is an ex-Police Personnel, who was working as armed Police Constable in Kutch district. A prosecution for offences punishable under Sections 379 and 124 of Indian Penal Code came to be lodged against him. He was tried by JMFC, Bhuj in Criminal Case No.1805 of 1982. Because of this prosecution, the appellant was placed under suspension. Learned JMFC at the end of the trial, acquitted the appellant of charges against him. The appellant was then taken back on duty by order dated 31-5-1983. Parallel to the prosecution, departmental proceedings were also initiated against the appellant and at the end of the inquiry, the charges against him were held to have been proved. The competent authority after giving requisite notice on 16-1-1984, passed an order of dismissal from service on 9-3-1984.

2.1 The appellant challenged that dismissal order by preferring a departmental appeal, which was rejected by order dated 1-5-1984.

3. Aggrieved by the said order, the appellant preferred

a Special Civil Application before this court under Articles 226 and 227 of the Constitution of India being No.3550 of 1985. The said writ petition came to be dismissed at admission stage by order dated 21-1-1986. The appellant therefore, preferred Letters Patent Appeal No.29 of 1987 before a Division Bench of this court, which also came to be dismissed by order dated 24-3-1988.

3.1 The appellant, having lost battle, preferred Regular Civil Suit No.587 of 1988 to challenge his dismissal from service. The appellant lost in the suit, in the first Appeal and therefore, present Second Appeal.

4. The contention that is raised by learned advocate for the appellant is that the scope of a writ petition under Article 226 of the Constitution of India and jurisdiction of a civil court are different. The scope before the civil court is wider and the decision is to be taken on basis of evidence led before it. Learned Advocate, Mr. Dave, for the appellant submitted that the suit, as well as, the appeal is dismissed on the ground that the question raised in the suit was already decided by this court in writ petition and Letters

Patent Appeal.

4.1 The question that came to be raised before this court in writ petition and Letters Patent Appeal, as well as in the civil suit and in the first appeal is whether departmental proceedings stood vitiated because of violation of principles of natural justice. It is contended that there is evidence on record to show that the appellant could not appear before the inquiry officer, because of demise of his sister. The appellant could not appear before the inquiry officer successively for two three days which were fixed in a span of about 8 days, as he was required to attend obsequial ceremonies of his sister. This aspect is not considered by the courts below on the ground that writ petition on this very ground was dismissed, so also, Letters Patent Appeal. According to Mr. Dave, the decision ought to have been taken by the courts below on basis of evidence led before them. Mr. Dave submitted that the scope for leading evidence in a writ petition is restricted, as compared to the scope for leading evidence in a suit. The decision in a writ petition is rendered on basis of affidavits sworn by parties and/or their supporting documents. Whereas, the specific evidence oral and documentary was led before

the civil court, which has not been considered by the courts below and, therefore, this appeal may be admitted, as it raises following substantial questions of law.

a. Whether the Disciplinary Authority has committed an error of law in totally ignoring the acquittal ordered by the Competent Court ?

b. Whether the refusal to grant relief by the Civil Court in wider suit on the premise that the issue has been finally decided by the Hon'ble High Court while rejecting the writ petition at the admission stage ?

c. Whether the Disciplinary Authority has committed error of law in refusing the opportunity to the appellant for his absence due to the death of his sister ?

d. Whether the FIR for non-informing of theft case and aiding the accused as construed to be of theft for imposing punishment has caused serious prejudice to the delinquent and rendered the order unconstitutional ?

4.2 Mr. Dave, therefore, submitted that this appeal may be entertained.

5.This court has gone through the judgments of both the courts below. It would not be correct to say that the courts below have not considered the evidence led by

the appellant inspite of his inability to attend departmental inquiry, because of demise of his sister. The courts below have considered the evidence but were not convinced and therefore, have decided not to place reliance on that evidence. Thus, findings are concurrent by both the courts and they are purely on factual aspects. It is settled proposition of law that first appellate court is the final court, so far as the findings of facts are concerned and Second Appeal can be entertained only, if, a substantial question of law arises for determination by this Court.

6. It would also be not correct to say, as is contended by learned Advocate for the appellant, that the Courts below have not accepted the plaintiff's case, only because the plaintiff's writ petition and Letters Patent Appeal had failed. That is not the solitary ground, on which the suit and appeal are dismissed. It is, but only an additional ground, which is considered by the Courts below.

7. The questions that are suggested by the appellant in memo of appeal, are pure questions of fact and cannot be termed as substantial questions of law, as they involve and call for consideration of certain factual

aspects as well. It is held in the case of **Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others, reported in A.I.R. 1999 SC 2213,** that the concurrent findings of fact howsoever erroneous cannot be interfered with by entertaining Second Appeal under Section 100 of the Civil Procedure Code.

8. It is held in the case of **Veerayee Ammal Vs. Seeni Ammal, reported in 2001 SC 2920** that such a question of law has to be precisely stated in the Memorandum of Appeal and formulated by the High Court in its judgment, for decision. The appeal can be heard only on the question, so formulated, giving liberty to the respondent to argue that the case before the High Court did not involve any such question.

9. It is also held in case Veerayee (supra) that, if the question of law termed as substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a

litigant should not be allowed to raise that question as substantial question of law in second appeal.

10.With this settled proposition of law, if the case before this Court is examined, it cannot be said that the appellant is able to make out a case for Second Appeal.

11.It is also a settled proposition of law that acquittal in criminal proceedings would not be a bar on holding a departmental inquiry and taking a decision thereon independent of the verdict rendered by the Criminal Court, though converse may not be true.

12.For the foregoing reasons, appeal must fail and stands dismissed.

(A.L.DAVE, J.)

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